



**Department of Energy**  
Washington, DC 20585

September 29, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David J. Norgard  
40150 Geneva Highway  
Manitou Beach, MI 49253

Re: FOIA Request No. 9705050014

Dear Mr. Norgard:

This is the final response to your above-referenced Freedom of Information Act (FOIA) request, in which you requested two categories of information. First, you requested Department of Energy (DOE) responses to requests for information by workers at Brush Wellman Inc. (formerly Brush Beryllium Co.), and by their family members, regarding the DOE beryllium medical monitoring and surveillance program, and related DOE internal correspondence. Second, you requested information regarding indemnification for Brush Wellman by the Government from the 1940's to the present.

In our initial response, dated February 16, 2000, we provided you with copies of 12 documents responsive to your request, and an index of those documents, entitled "Index of Documents Released in Full in Response to FOIA Request No. 9705050013." We explained that we were in the process of reviewing additional responsive documents, and that we would provide you with copies of those which are releasable in accordance with the standards of the FOIA and the Department's regulations thereunder, and also provide you with a separate index of those documents or parts of documents which are not to be released according to those standards, with justifications for our decisions to withhold those materials.

In this final response, we are providing you with three groups of documents. First, enclosed are copies of 30 additional documents released in full, and an index of those documents, entitled "Part II of Index of Documents Released in Full in Response to FOIA Request No. 9705050013." Those 30 additional documents are numbered Documents 13 through 42 on that index. All 42 of those documents released in full are responsive to the second category of information you requested.

Second, we are providing you with the enclosed documents in Attachment A, which are responsive to the first category of information you requested. Those documents consist of DOE responses to requests for information by Brush Wellman workers and their family members regarding the DOE beryllium medical monitoring and surveillance program, and related DOE

internal correspondence. DOE has withheld the portions of those documents which contain the names, home addresses, and home telephone numbers of individuals who identified themselves, or their spouse, as beryllium workers who may have a beryllium-related disease. DOE has withheld that personal information pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and 10 C.F.R. § 1004.10(b)(6).

Exemption 6 permits the Government to withhold all information about individuals in "personnel and medical files and similar files" when disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." There is a substantial probability that purely personal information such as names, home addresses, and home telephone numbers, if made available to the public, would cause an interference with personal privacy. Furthermore, that kind of information has no relation to the operations of this agency or the federal government. Disclosure of this information is therefore not mandatory.

The personal information protected by Exemption 6 is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure in accordance with 10 C.F.R. § 1004.1. The reasonably expected consequence of disclosure would be harmful to an important interest protected by the exemption, i.e., the protection of a viable privacy interest of the individuals listed. This is especially true here, where no public interest related to the core purpose of the FOIA would be served by disclosure of the individual names, home addresses, and home telephone numbers redacted. Accordingly, we are not making discretionary disclosure of this information.

Third, DOE has withheld portions of 85 documents responsive to the second category of information you requested. Each page was reviewed to determine if any portion could be provided after redaction of exempt material. We have determined that portions of 82 documents can be provided. The other 3 documents consist of handwritten notes by DOE attorneys, in which the releasable material is inextricably intertwined with exempt material so that release would compromise the exempt material.

Enclosed is an index of those 85 privileged documents, entitled "Index of Privileged Documents Responsive to FOIA Request No. 9705050014." That index describes each of the 85 privileged documents, and identifies the items in your request to which they are responsive, as well as the privileges under which portions have been withheld. Also enclosed are copies of the released portions of 82 of those documents, after the redaction of exempt material. The 3 documents which have been withheld in full are Documents Nos. 4-6 in that index.

The reasons for withholding portions of the 85 documents are as follows:

(1) Three of those 85 documents concern the letter dated January 17, 1989, from Brush Wellman counsel Randall E. Davis to DOE Under Secretary Donna Fitzpatrick, which you referenced in your request. Those three documents (Documents 1-3 in the enclosed index of privileged documents) are communications between DOE attorneys prepared in contemplation of litigation, and are protected by the attorney work-product privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), 10 C.F.R. § 1004.10(b)(5).

(2) A total of 30 documents consist of notes by DOE attorneys, and communications between Government attorneys, concerning Brush Wellman's demands that the U.S. indemnify Brush and possible settlement of those demands. Of those 30 documents, six documents (Documents 4-9) consist of notes by DOE attorneys made in contemplation of litigation; and 24 documents (Documents 10-33) are correspondence between Government attorneys at DOE and the Department of Justice prepared in contemplation of litigation. All 30 documents are protected by the attorney work-product privilege. In addition, two of those documents (Documents 11 and 24) are communications between DOE and attorneys at the Department of Justice who represented DOE, and are protected by the attorney-client privilege.

(3) Two documents (Documents 34 and 35) contain communications between a DOE attorney and his client at DOE concerning Brush Wellman's demands that the U.S. indemnify Brush and possible settlement of those demands, and were made in contemplation of litigation. Those two documents are protected by both the attorney-work product privilege and the attorney-client privilege.

(4) A total of 46 documents (Documents 36-81) are communications between Government attorneys at DOE and the Department of Justice, on the one hand, and attorneys and officials at Brush Wellman, on the other, made in the course of settlement negotiations between the Government and Brush Wellman concerning Brush's demands that the U.S. indemnify Brush. Those communications were part and parcel of the Government's deliberative process during settlement negotiations, and are protected by the deliberative process privilege and the settlement negotiations privilege incorporated into FOIA Exemption 5. Two of those documents (Documents 53 and 78) also contain individuals' medical and personnel records, which are protected personal information pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and 10 C.F.R. § 1004.10(b)(6), for the reasons explained above.

(5) The remaining four documents (Documents 82-85) contain confidential commercial or financial information that Brush Wellman provided to DOE in the course of settlement negotiations between the Government and Brush, and are protected under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), 10 C.F.R. § 1004.10(b)(4). Three of those documents (Documents 82-84) are also protected by the deliberative process privilege and the settlement negotiations privilege, for the reasons explained in the preceding paragraph.

As indicated above, the 85 documents have been withheld under privileges incorporated into FOIA Exemption 5 and/or FOIA Exemption 4. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It shelters those documents normally privileged in the civil discovery context. Applicable here are the attorney work-product privilege, the attorney-client privilege, the deliberative process privilege, and the settlement negotiations privilege.

The documents withheld under the attorney work-product privilege were prepared by DOE attorneys, or Department of Justice attorneys, in contemplation of reasonably probable litigation. They deal with aspects of claims by Brush Wellman for indemnification by DOE, with the threat

of litigation to follow if those claims were not settled. The withholding of those documents protects the adversarial process by insulating the attorneys' preparation from scrutiny.

The documents withheld under the attorney-client privilege are communications between DOE attorneys and their clients, and between Justice Department attorneys and their clients at DOE, concerning legal matters for which the clients sought professional advice. The nature of the task and the predecisional nature of these communications demonstrate that these are confidential communications and that the Government is dealing with attorneys as would a private party seeking advice to protect personal interests.

The documents withheld under the deliberative process privilege and the settlement negotiations privilege were created in the course of settlement negotiations between the Government and Brush Wellman concerning Brush's demands that the U.S. indemnify Brush, and were prepared to assist Government decisionmakers in arriving at their decision on the issue of settlement. They reflect the analysis, deliberations, and recommendations that are part of the deliberative process leading to a final decision on the issue of settlement, and comprise part of the process by which Government decisions on the issue of settlement were considered. They are thus protected by the deliberative process privilege.

Those documents are also protected by the distinct settlement negotiations privilege, pursuant to which they would not be routinely or normally disclosed in civil discovery. The withheld material consists of exchanges of opinions, information, and proposals between Government attorneys, and Brush Wellman attorneys and officials, concerning the pros and cons of possible settlements in light of the perceived strengths and weaknesses in Brush's claims for DOE indemnification. Release of that material would have a chilling effect on the willingness of attorneys to prepare honest evaluations, recommendations, and proposals concerning similar claims and settlement negotiations in the future. Release of information that Brush Wellman voluntarily provided to DOE during settlement negotiations would have a chilling effect on other persons having an adverse position to that of DOE from providing such information and conducting meaningful settlement negotiations in the future. Disclosure of these documents would eliminate the confidentiality necessary to permit settlement negotiations to occur, and would contravene the strong public policy favoring settlement of legal claims.

Discretionary disclosure of the above-described material protected by FOIA Exemption 5 would not be in the public interest. Release of the attorneys' work product would damage the adversarial process by interfering with attorneys' preparation for and participation in sensitive settlement negotiations involving DOE in the future. Release of the material exchanged between attorneys and clients would result in their not being open and candid with each other, and attorneys would not be able to adequately advise and represent their clients. Sound legal advice and advocacy serve the public interest and depend upon attorneys being fully informed by their clients and able to communicate with them. Disclosure of the deliberative materials created and exchanged during settlement negotiations would seriously undermine the negotiation process. The quality of agency decisions concerning settlement would be adversely affected if frank, written exchanges during settlement negotiations were inhibited by the knowledge that the content of such exchanges would be made public. Therefore, discretionary disclosure of this material is not being

made because the reasonably expected consequences of disclosure would be harmful to the above-described interests protected by Exemption 5.

FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Information that is required to be submitted by a person is "confidential" for purposes of Exemption 4 if disclosure is likely to either (1) impair the Government's ability to obtain reliable and high quality necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information is obtained. The material withheld under Exemption 4 contains detailed commercial and financial information concerning Brush Wellman's legal fees and costs, its partial reimbursement by its insurance, and its settlement agreements with non-Government parties who agreed with Brush not to disclose to any person the terms of those agreements, as well as the trust account number and federal express account number of one of Brush's attorneys. That information was held in confidence, and there is a reasonable basis for Brush to hold such information in confidence. The information was transmitted to and received by DOE in confidence, in the course of settlement negotiations between Brush and DOE; it is not available in public sources; and its disclosure is likely to cause substantial harm to Brush's competitive position by making specific and detailed commercial and financial data available to its competitors. Therefore, the information is authorized to be withheld under Exemption 4.

Discretionary disclosure of that information would not be in the public interest. Exemption 4 protects information implicating private commercial interests that would not ordinarily be subject to discretionary FOIA disclosure. In addition, the Trade Secrets Act, 18 U.S.C. § 1905, a criminal statute effectively prohibiting the unauthorized disclosure of all data protected by Exemption 4, prohibits discretionary release of that information because no other law authorizes its release.

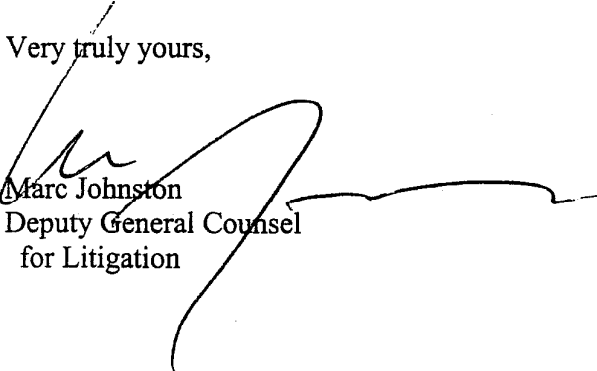
Moreover, because the information withheld under Exemption 4 was provided by Brush Wellman to DOE in the course of settlement negotiations between those two parties, its release would eliminate the confidentiality necessary to permit settlement negotiations to occur, and would contravene the strong public policy favoring the settlement of legal claims. Therefore, that information is also protected from disclosure by the deliberative process privilege and the settlement negotiations privilege of Exemption 5, as explained above.

I am the Denying Official with respect to the portions of this determination which constitute a denial of your request.

Pursuant to 10 C.F.R. § 1004.8, you may appeal those portions of this determination constituting a denial of your request by submitting a written appeal to the Director, Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, D.C. 20585-0107, within 30 calendar days of receipt of this determination. The written appeal, including the envelope, must clearly indicate that a Freedom of Information appeal is being made, and the appeal must contain all the elements required by 10 C.F.R. § 1004.8. Judicial review will thereafter be available in the district where you reside, the district where you have your principal

place of business, the district where the Department's records are located, or in the District of Columbia.

Very truly yours,



Marc Johnston  
Deputy General Counsel  
for Litigation

Enclosures